

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH R. WEBER	:	
Plaintiff	:	
	:	CIVIL ACTION
v.	:	
	:	
WILLIAM J. HENDERSON,	:	NO. 99-CV-2763
et al.,	:	
Defendants.	:	

EXPLANATION and ORDER

Before me is defendants' motion for summary judgment.

Plaintiff Joseph Weber, an employee of the United States Postal Service ("USPS"), has brought this pro se action against William J. Henderson, Postmaster General of the United States, and Alexis M. Herman, Secretary of Labor, United States Department of Labor ("DOL"). Weber alleges that the defendants discriminated against him in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 791,¹ by not timely allowing him to "buy back" sick leave used during November and December of 1991 and January of 1992. Weber alleges that defendants further violated the Rehabilitation Act by retaliating against him for filing Equal Employment Opportunity ("EEO") and Equal Employment Opportunity Commission ("EEOC") complaints. Additionally, plaintiff asserts that defendants have violated "Merit Systems Principles," 5 U.S.C.

¹The Rehabilitation Act is the exclusive means by which a federal employee may raise a claim for disability discrimination. See Spence v. Straw, 54 F.3d 196 (3d Cir. 1995).

§§ 2301-2302, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. For the reasons explained below, I will grant defendants’ motion as to all of Weber’s claims.²

FACT CHRONOLOGY

Nov. 91 - Jan. 92: Weber is out of work due to a stress-related condition, which he claims was brought on by disciplinary actions taken against him at work. The absence consumes approximately 200 hours of his sick leave. Weber timely files compensation claim no. A3-170180 (“the stress claim”) with the Office of Worker’s Compensation Programs (“OWCP”) of the DOL.

August 31, 1995: After repeated refusals, the OWCP approves the stress claim, authorizing compensation for the 1991-92 illness.

²As I have pointed out in earlier opinions, Weber is no stranger to this court. Since December of 1997, he has brought six civil actions before me, seeking judicial relief under a variety of legal theories for alleged mistreatment at the hands of the DOL and the USPS. See Weber v. Herman, civil action no. 97-cv-7880 (settled and dismissed 11/2/98; Weber petitioned for enforcement order 7/17/00); Weber v. Henderson, 98-cv-6197 (Privacy Act claims; granted summary judgment for defendants 12/12/00); Weber v. Henderson, 99-cv-2574 (Rehabilitation Act claims; granted summary judgment for defendants 1/31/01); Weber v. Henderson, 00-cv-4029 (Rehabilitation Act claims); Weber v. Henderson, 01-cv-40 (restating prior claims).

A review of the docket reveals that, from 1994 to 1997, Weber brought five other civil actions in the Eastern District of Pennsylvania. None of those five cases progressed beyond the pleadings stage. See Weber v. National Association of Letter Carriers, case no. 94-cv-1204 (Judge Dalzell; stipulation of dismissal by plaintiff Weber 7/20/94); Weber v. National Association of Letter Carriers, 94-cv-7794 (Judge O’Neill; stipulation of dismissal by plaintiff Weber 9/18/95); Weber v. United States, 95-cv-577 (Judge Bechtel, stipulation of dismissal by plaintiff Weber 11/28/95); Weber v. Keystone Branch No. 157, 96-cv-3097 (Judge Reed, action dismissed with prejudice 12/22/97); Weber v. Runyon, 97-cv-4301 (Judge Dalzell, action dismissed with prejudice, 1/15/98).

February 12, 1996: Weber asks the USPS and the OWCP to begin processing a “buy back” of the sick leave he used during his 1991-92 illness.³ He asks to buy back sick leave used from November 26, 1991 through January 10, 1992.

April 12, 1996: Weber makes a formal request for documents under the Freedom of Information Act ("FOIA"). He asks the USPS to provide documentation on his pay status and attendance from November 25, 1991 through January 10, 1992. This formal request follows Weber's unsuccessful attempts to get this information through his station manager.

May 9, 1996: In response to FOIA request, the USPS tells Weber that he can obtain copies of his payroll records at his own cost. The USPS estimates the cost of obtaining the records at \$97.15.

May 12, 1996: In a letter to the legal department of the USPS, Weber expresses his dissatisfaction with the response to his FOIA request. He indicates that he will file a civil action if he does not receive his payroll records by May 18, 1996.

December 19, 1997: Weber files Weber v. Herman, civil action no. 97-7880, which alleges that the USPS and the DOL violated the Federal Employees Compensation Act

³When an employee uses sick leave for an injury which is later determined to be work-related, the employee is permitted to buy back the sick leave that he previously used and to substitute the worker's compensation benefits from the OWCP. The amount of money needed to buy back the sick leave from the agency may be more than the worker's compensation benefits received from the OWCP. Memorandum of Law in Support of Defendants' Motion for Summary Judgment at pp. 8-9, n.2.

(“FECA”) in failing to allow him to buy back the sick leave used during n 1991-92. He also alleges First Amendment violations.

April 28, 1998: Weber contacts an EEO counselor, alleging that discrimination on the basis of disability and retaliation resulted in defendants’ abridging his right to buy back sick leave.

August 11, 1998: Weber files a formal EEO complaint, no. 4-C-190-0149-98 (“the buy back claim”).

October 28, 1998: At a hearing, I settle and dismiss civil action no. 97-cv-7880.

March 8, 1999: The USPS dismisses the buy back claim on the grounds that Weber did not contact an EEO counselor within the 45-day time limit.

June 1, 1999: Weber files the instant civil action, no. 99-cv-2763, seeking review of the EEO decision on the buy back claim.

DISCUSSION

1. Summary Judgment Standard

Summary judgment shall be granted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). The role of the trial court is to determine whether there are material factual issues that merit a trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). If the record “could not lead a rational trier of fact to find for the nonmoving party, there

is no ‘genuine issue for trial.’” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

At summary judgment, the court must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the underlying facts. See Matsushita, 475 U.S. at 587; Sempier v. Johnson and Higgins, 45 F.3d 724, 727 (3d Cir. 1995)(en banc). The nonmoving party, however, must “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586. A nonmoving party cannot rely upon conclusory allegations to establish a genuine issue of fact. See Pastore v. Bell Telephone Co. of Pennsylvania, 24 F.3d 508, 511 (3d Cir. 1994). Rule 56 states that the nonmoving party “must set forth specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56(e). A court must grant summary judgment if the nonmoving party fails to make a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

2. Rehabilitation Act Claims: Administrative Exhaustion

“A plaintiff must exhaust all required administrative remedies before bringing a claim for judicial relief.” Robinson v. Dalton, 107 F.2d 1018, 1020 (3d Cir. 1997)(citing McCart v. United States, 395 U.S. 185, 193 (1969)). The Third Circuit has held that a plaintiff must exhaust Title VII remedies before bringing suit under the Rehabilitation Act. Spence v. Straw, 54 F.3d 196, 201 (3d Cir. 1996). A complaint submitted under the Rehabilitation Act or Title VII does not state a claim unless it asserts the satisfaction of the precondition to suit: prior submission of the

claim to the EEOC for conciliation and resolution. See Robinson, 107 F.3d at 1022 (quoting Hornsby v. United States Postal Service, 787 F.2d 87, 90 (3d Cir. 1986)). Failure to timely exhaust administrative remedies is grounds for dismissal or summary judgment for failure to state a claim. See Robinson, 107 F.2d at 1022; Volpini v. Resolution Trust Corp., 1997 WL 476347 (E.D.Pa. Aug. 19, 1997).

Under the applicable EEO regulations, an employee of a federal agency must bring his claim of discrimination to the attention of an EEO counselor “within 45 days of the date of the matter alleged to be discriminatory.” 29 C.F.R. § 1614.105(a)(1). The 45-day time limit for presenting a claim is not jurisdictional, but rather akin to a statute of limitations and thus subject to equitable modifications such as tolling. Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990). To determine if Weber exhausted required administrative remedies before filing this civil action, I must decide: a) whether his EEO complaint was filed in a timely manner, and b) if not, whether the equitable tolling doctrine may excuse Weber’s failure to comply with the time limit.

A) Did Weber comply with the time limit imposed by the applicable regulations?

Generally, a statute of limitations begins to run when plaintiff’s cause of action accrues: not when plaintiff understands that his injury constitutes a legal wrong, but when “he is aware, or should be aware, of the existence of and source of an injury.” Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994). Weber’s claim accrued when he knew that the defendants were not allowing him to buy back the sick leave he used during his 1991-92 illness. Weber initiated the buy back in February of 1996. The USPS told Weber in May of 1996 that he

would have to pay for copies of his payroll records in order to facilitate the buy back.

Dissatisfied with this response, Weber wrote a letter to the USPS on May 12, 1996.

In the letter, Weber stated that he would file a civil action should the USPS not provide the requested documents by May 18, 1996. The USPS did not meet his demand. Yet Weber did not contact an EEO counselor until April 28, 1998, almost two years after he threatened to file a lawsuit based on the defendants' failure to process the buy back.

That EEO contact would be timely only if Weber could show that his cause of action accrued no more than 45 days before April 28, 1998. He cannot make such a showing. The letter demonstrates that he was aggrieved by defendants' failure to process his buy back by May 12, 1996. If not at that time, Weber surely knew the existence and source of this injury when he filed a federal lawsuit against these defendants in December of 1997.⁴ Therefore, his April 28, 1998 contact with the EEO counselor was not timely.

B) Can equitable tolling save Weber's untimely Rehabilitation Act claims?

Weber also contends that his untimely EEO contact should be excused by equitable tolling principles. The Third Circuit has explained that equitable tolling may be appropriate: "1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; 2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights;

⁴On December 19, 1997, Weber filed Weber v. Herman, civil action no. 97-cv-7880. The complaint alleged that the USPS and the DOL violated the Federal Employees Compensation Act by failing to allow Weber to buy back sick leave used during the 1991-92 illness that is the subject of this case. During a hearing held on October 28, 1998, defendants agreed to give Weber an opportunity to buy back his sick leave. I then dismissed civil action no. 97-cv-7880.

or 3) where the plaintiff timely asserted his or her rights mistakenly in the wrong forum.”

Oshiver, 38 F.3d at 1387. The burden is on the plaintiff to demonstrate facts that support tolling the limitations period. See Byers v. Follmer Trucking Co., 763 F.2d 599, 600-01 (3d Cir. 1985). That burden is substantial. Federal courts have extended equitable relief only sparingly, allowing it in situations where the claimant has filed a defective pleading during the statutory period, or where the filing deadline passes as a result of the adversary’s trickery. Irwin, 498 U.S. at 96 (collecting cases). “We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.” Id. (citing Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984)).

In denying defendants’ motion to dismiss this claim, I suggested that Weber could justify tolling by showing that because of defendants’ deception, he could not have discovered, by reasonable diligence, the essential factual information bearing on his claim. See Oshiver, 38 F.3d at 1390. Weber has not made such a showing. He suggests that confusion over which agency should handle his claim, the USPS or the OWCP, clouded the issue of whom he should contact with his complaint. However, Weber does not allege that such confusion was the result of active deception on the part of either defendant.

Weber has not provided any facts to support tolling the limitations period. Having failed to exhaust his administrative remedies, Weber cannot state claims of discrimination or retaliation under the Rehabilitation Act. Therefore, I will grant summary judgment for defendants as to those claims.

3. “Merit System Principles,” 5 U.S.C. §§ 2301-02

Section 2301 is part of the Civil Service Reform Act (“CSRA”), a comprehensive effort to regulate employee-management relations in the federal government. The CSRA sets out an administrative claims procedure, but does not provide plaintiff with a private right of action. See Alasevich v. U.S. Air Force Reserve, 1997 WL 152816 *6 (E.D.Pa. Mar. 26, 1997).⁵ Weber has not shown that he is entitled to remedies under the CSRA; nor has he shown that he exhausted the administrative remedies provided in the CSRA. Accordingly, I will grant defendants’ motion for summary judgment on these claims.

4. Administrative Procedure Act, 5 U.S.C. § 701 et seq. (“APA”)

Nor can Weber state a claim under the APA. He has an adequate remedy for his discrimination and retaliation claims under the Rehabilitation Act, which allows him to seek de novo review of the EEO decision in federal court. See Adams v. United States Equal Employment Opportunity Commission, 932 F.Supp. 660, 664-65 (E.D.Pa. 1996).

Nor can Weber secure judicial review of his workers’ compensation claims under the APA. FECA contains a broad preclusion-of-review provision which bars judicial review of matters arising within its scope. See 5 U.S.C. § 8128(b). The Supreme Court has found that when Congress uses preclusive language of the type used in FECA, it “intends to bar judicial review altogether.” Lindahl v. Office of Personnel Management, 470 U.S. 81, 90. This court

⁵The CSRA provides a claims procedure for government employees. Through the Merit Systems Protection Board and the Office of Special Counsel, the CSRA seeks to ensure the protection of whistleblowers against retaliation. A government employee could only seek judicial relief after receiving a final order from the Board. Alasevich, 1997 WL 152816 *6.

does not have jurisdiction to review Weber's workers' compensation claim under the APA.

Therefore, I will grant defendants' motion for summary judgment on this claim as well.

For those reasons, I grant Defendants' Motion for Summary Judgment. An appropriate order follows.

AND NOW, this day of March, 2001, having considered Defendants' Motion for Summary Judgment and Plaintiff's "Motion to Dismiss Defendants' Motion for Summary Judgment" it is **ORDERED** that:

- 1) Defendants' Motion for Summary Judgment (docket entry no. 17) is **GRANTED**;
- 2) Plaintiff's "Motion in Dismiss Defendants' Motion for Summary Judgment" (docket entry no. 19) is **DENIED** .

It is **FURTHER ORDERED** that the Clerk shall close this case statistically.

ANITA B. BRODY, J.

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